Public Rights on Great Lakes Beaches

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By

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INTRODUCTION

No Wisconsin statutes, supreme court cases, or administrative rules expressly grant or deny public rights to recreation on Great Lakes beaches fronting private lands. Either the Wisconsin Supreme Court or Legislature could recognize public rights in Great Lakes beaches. The Wisconsin Legislature, however, would probably face severe political obstacles. A court case, therefore, is a more feasible method for establishing public rights in Great Lakes beaches.

To win a court case, the advocate must convince the court that public rights in Great Lakes beaches is good public policy, supply a legal theory on which the court can rely, and build a factual record which supports the public policy and satisfies the elements of the legal theory. This paper addresses four legal theories and their necessary factual records. The public policy argument and its necessary factual record are identical for each legal theory.

Public rights to recreation on Great Lakes beaches is good public policy for two reasons. First, the public's use of public recreation facilities in Wisconsin is increasing. Unfortunately, the taxpayer's money allocated to acquisition of public land is decreasing. Public land acquisition, therefore, will not meet the public demand for public recreational facilities. The Great Lakes beaches fronting private lands are now used by the public for a variety of recreational activities. If a court decides the public has no right to use the Great Lakes beaches, the public demand for beaches and other public lands for recreation will increase. On the other hand, if a court recognizes the public's right to recreation on Great Lakes beaches, a vast public recreational resource will be available, at no cost to the state treasury, to meet the growing public need for recreational facilities.

A second public policy reason to recognize public rights in Great Lakes beaches is to protect Wisconsin's tourist industry. Tourism is a major industry in Wisconsin. A significant amount of Wisconsin's tourism is related to Great Lakes beaches. Therefore, if a court decides the public has no right to recreation on Great Lakes beaches, the tourism industry will be harmed.

The public policy reasons outlined above are examples only. Many other public policy reasons may support public rights in Great Lakes beaches. All assertions on which the public policy arguments are based must be supported by a factual record. Many of the assertions probably could be supported by statistics and reports already developed by state agencies.

This paper addresses four legal theories which courts in other states have used to recognize public rights in beaches: Public Trust Doctrine, custom, implied dedication, and prescriptive easement. Each theory is discussed in five sections:

(A) The elements of the theory and cases from other states applying the theory to beaches;

(B) Wisconsin cases applying the theory;

(C) The factual record necessary to support the theory;

(D) Constitutional arguments by riparians; and

(E) Evaluation of the usefulness of the theory to establish public rights to recreation on Wisconsin's Great Lakes beaches.

I. PUBLIC TRUST DOCTRINE

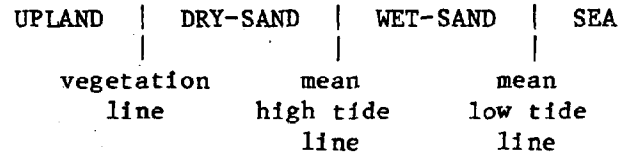
A. Public Trust - Other States

The Public Trust Doctrine is ancient. Under Roman law, the seashore was public, open to the common use of all citizens and controlled by the government.[1] Early English common law held that certain rights in navigable waters and tidelands were kept in trust for public use, even if an individual held title to the land.[2] In 1892, the United States Supreme Court said the states hold the tidelands and navigable water beds in trust to preserve public rights of navigation, fishing, and commerce.[3]

Two issues determine the usefulness of the Public Trust Doctrine to establish public rights in beaches: (1) the boundary line between private property and public trust property; (2) the nature of public rights in trust property. These issues are controlled by state law.[4] State law may vary for non-tidal and tidal waters.

1. Tidal Waters

All twenty-three states with ocean coasts have case law concerning the public trust boundary. Three potential boundary lines are illustrated by the chart below.



Seventeen coastal states use the mean high tide line boundary and apply the Public Trust Doctrine to the wet-sand portion of the beach: Alabama, Alaska, California, Florida, Georgia, Hawaii, Louisiana, Maryland, Mississippi, New Jersey, New York, North Carolina, Oregon, Rhode Island, South Carolina, Texas, and Washington.[5] In many of these states, the courts have held that the public has the right to walk on the wet-sand area of the beach.[6] A good example is Marks v. Whitney[7] in which the California Supreme Court held that the wet-sand area is subject to the Public Trust Doctrine. The court stated that the public's rights in the wet-sand area include hunting, fishing, bathing, sunbathing, navigation, and general recreation. The riparian's rights (throughout this paper, the term "riparian" will include any landowner whose property borders a river, lake, or ocean) include the rights to build piers and to access from his land through the wet-sand area to the water. The riparian rights, however, are subject to the superior public rights. The court noted that because population, shoreline development, and demands for recreational property were expanding, the public's rights in the wet-sand area are increasingly important. The court said: "The public uses to which tidelands are subject are sufficiently flexible to encompass changing public needs."[8]

Six coastal states use the mean low tide line boundary: Delaware, Maine, Massachusetts, New Hampshire, Pennsylvania, and Virginia.[9] In these states, the public has no rights in the wet-sand area when the tide is out. When the wet-sand is covered by water, however, the public trust applies.[10] For example, in In Re Opinion of the Justices,[11] the Massachusetts Supreme Court held that the Public Trust Doctrine does not allow the public to walk on the exposed wet-sand area. The court said that riparian rights in the wet-sand area were subject only to the public's right to navigation when the wet-sand was covered with water.

None of the coastal states use the vegetation line boundary; therefore, the Public Trust Doctrine generally does not apply to the dry-sand area.[12] In Neptune City v. Avon-By-The-Sea,[13] however, the New Jersey Supreme Court held that the Public Trust Doctrine applied to the dry-sand area when the city had dedicated the area to the public. The court invalidated an ordinance which charged a higher beach user fee to non-city residents than to city residents. Using reasoning similar to that of the California court in Marks v. Whitney, the New Jersey court stated:

> Remaining tidal water resources still in the ownership of the State are becoming very scarce, demands upon them by reason of increased population, industrial development and their popularity for recreational uses and open space are much heavier, and their importance to the public welfare has become much more apparent.[14]
>
> [T]he public rights in tidal lands are not limited to the ancient prerogatives of navigation and fishing, but extend as well to recreational uses, including bathing, swimming and other shore activities. The public trust doctrine, like all common law principles, should not be considered fixed or static, but should be molded and extended to meet changing conditions and needs of the public it was created to benefit.[15]

No other coastal state has followed New Jersey's lead.

2. Non-Tidal Waters

For non-tidal waters, states use one of two boundary lines: the ordinary high-water mark (OHWM) or the ordinary low-water mark (OLWM). Most states define the OLWM as the water's edge. To evaluate a state's law of public rights to walk on beaches, one must know both the boundary between state trust lands and private lands and the nature of public and private rights in trust lands.

Many states use the OLWM boundary: Delaware, Illinois, Michigan, Minnesota, Montana, New York, North Dakota, Ohio, Pennsylvania, South Dakota, and Washington.[16] In most of these states, the riparian has the exclusive right of access to the water and qualified title to the land between the OHWM and OLWM. The riparian's rights are subject only to the public's rights of navigation and commerce; thus, the public could float on the water above the land between the OHWM and OLWM but the public could not walk on the same land if the water was

not present.[17] All of the Great Lakes states apply the rules stated above to inland lakes.[18] No Great Lakes states, however, have expressly granted or denied public rights of recreation on Great Lakes beaches.[19]

Several states use the OHWM boundary: Arkansas, Florida, Idaho, Iowa, and Louisiana.[20] In these states the riparian has the right of access to the water. The riparian's right of access is not exclusive; thus, the public has the right to walk, fish, and sunbath on the land between the OHWM and OLWM.[21]

No states hold that the Public Trust Doctrine gives the public the right to walk on the beach between the OHWM and the vegetation line. In State Ex. Rel. Haman v. Fox,[22] the Idaho Supreme Court held that the Public Trust Doctrine did not apply to the beach above the OHWM. The public could not force lake riparians to remove fences excluding the public from beach area above the OHWM.

A pattern emerges from the non-tidal water cases discussed above. In states which use the OLWM boundary, the riparian's rights in the land between the OHWM and OLWM are subject only to the public's rights of navigation and commerce. The public has the right to float on the water as far as it extends but no right to walk on the beach above the actual water line. In states using the OHWM boundary, the riparian's rights are subject to the public's rights in navigation and its incidents--bathing, swimming, fishing, hunting. Thus, the public has the right to walk on the beach between the OHWM and OLWM above the actual water line.

A recent California case breaks this pattern. In State v. Superior Court of Lake County,[23] a lake riparian wanted to reclaim and develop a 500-acre marsh located between the OHWM and OLWM. The court held that the riparian's title extended to the OLWM. The riparian argued that because his rights were subject only to the public's rights of navigation and commerce, and the marsh was not navigable, the public had no rights in the marsh between the OHWM and OLWM. The riparian also argued that the coastal tidelands rule of Marks v. Whitney (Section I.A.1. above) (the public has the right to use the land between the OHWM and OLWM for the incidents of navigation--sunbathing, walking) should not apply to non-tidal waters. The riparian attempted to differentiate non-tidal from tidal waters because tidal waters cover the land between the OHWM and OLWM twice daily making that area useful for navigation and commerce, while non-tidal waters cover the land between the OHWM and OLWM seasonally making that area useful for navigation and commerce for only a limited time each year.

The California Supreme Court rejected the riparian's arguments. The court held that the Public Trust Doctrine gave the public the right to the incidents of navigation, including sunbathing and walking, on the land between the OHWM and OLWM. The court said the same reasons that underlay the Marks v. Whitney decision applied to non-tidal waters: increasing population, shoreland development, public demand for recreation areas, and the flexibility of the Public Trust Doctrine.

The Lake County decision is particularly strong because, as the dissent points out, in California the reclamation of non-tidal marshlands contributes heavily to the state's huge agriculture industry.

B. Public Trust - Wisconsin

Public rights in navigable waters are based on a provision in the Northwest Ordinance of 1787 which states, "the river Mississippi and the navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways and forever free ...." This provision was incorporated verbatim in Art. IX sec. 1 of the Wisconsin Constitution. The Wisconsin Supreme Court has consistently interpreted Art. IX sec. 1 to mean the state holds the beds of navigable lakes in trust for the public.[24] Whether the public has the right to walk on the Great Lakes beaches depends on the boundary between public and private land and the nature of public and riparian rights in the beach.

1. Early Cases

Early cases discuss four different boundaries between riparian and state ownership of lake beds. In Diedrick v. Northwestern Union Rail Company,[25] the court said a riparian owns the land to the natural shore of the lake. In Delaplanie v. Chicago and Northwestern Railway Co.,[26] the court said a riparian owns to the water's edge. In McLennan v. Prentice,[27] the court held that the state owned the Lake Michigan bed under the shoal water between the shore and the navigable water. The court said the riparian owned to the OLWM. In Illinois Steel Co. v. Bilot,[28] and C. Beck Co. v. Milwaukee,[29] the court said the state owns the bed of Lake Michigan below the OHWM.

The early cases establish five principles concerning the interrelationship of riparian and public rights in navigable waters. First, riparian rights are based on ownership of the bank, not on title to the lake bed.[30] Second, a riparian has the right to exclusive access to the water in front of his property. The exclusive access right is a private right distinct from public rights in waters.[31] Third, riparian rights are subject to paramount public rights in navigable waters.[32] Fourth, the paramount public rights are the rights to use navigable waters for commerce and navigation.[33] The public's right to navigation includes the incidents of navigation: travel, hunting, fishing and recreation.[34] Fifth, the court broadly interpreted public rights in waters, illustrated by this quote from Dianna Shooting Club v. Husting:[35]

> The wisdom of the policy which, in the organic laws of our state, steadfastly and carefully preserved to the people the full and free use of public waters, cannot be questioned. Nor should it be limited or curtailed by narrow constructions. It should be interpreted in the broad and beneficent spirit that gave rise

to it in order that the people may fully enjoy the intended benefits. Navigable waters are public waters and as such they should inure to the benefit of the public. They should be free to all for commerce, for travel, for recreation, and also for hunting and fishing, which are now mainly certain forms of recreation. Only by so construing the provisions of our organic laws can the people reap the full benefit of the grant secured to them therein. This grant was made to them before the state had any title to convey to private parties, and it became a trustee of the people charged with the faithful execution of the trust created for their benefit. Riparian owners, therefore, took title to lands under navigable waters with notice of such trust and subject to the burdens created by it.

2. Doemel v. Jantz

The only Wisconsin case that addresses whether the public has a right to walk on the exposed lake bed between the OHWM and OLWM is Doemel v. Jantz.[36] In Doemel, a riparian on Lake Winnebago brought an action for trespass against the defendant who walked on the shore between the OHWM and OLWM. Both the riparian and the defendant made two legal arguments. First, the riparian argued that he owned the shoreline to the OLWM. The defendant contended the state held the land between the OHWM and OLWM in trust for the public. Second, the riparian argued that even if the state owned the lake bed to the OHWM, a riparian had a right of exclusive access to the land between the OHWM and the OLWM. The defendant argued that even if the riparian had a qualified title to the OLWM, the public had an easement in the land between the OHWM and OLWM. The defendant contended the public easement included the use of the land for navigation and its incidents, public travel, and other public purposes.

The court held that the public had no right to walk on the shore between the OHWM and OLWM; therefore, the riparian could collect damages from the defendant for trespass. The court discussed the two arguments stated above.

The court said that regardless of whether the public or riparian had title to the shore between the OHWM and OLWM, the relationship of public and riparian rights determined the outcome of the case. The court analyzed its earlier cases and defined three aspects of riparian rights. First, riparian rights are based on ownership of the banks. Second, riparians have exclusive privileges in the shore for access to the water. Third, the riparian's privileges are valuable and the public can acquire them only through purchase, eminent domain, or prescription.

Public rights in navigable waters, the court said, are based on navigation for commerce. The court noted that the public rights had expanded to include incidents of navigation: fishing, hunting, boating, bathing, and recreation. The court stated that the concept of navigation had been expanded to respond to "public requirements". The court qualified its statement that riparians have a right of exclusive access to the shore by recognizing that the riparians' right is subordinate to the public rights in navigation.

The court articulated a rule which defined the ownership of the shore and corresponding public and riparian rights according to the actual water level of the lake. When the water covers the land up to the OHWM, the riparian has a qualified title to the land between the OHWM and OLWM, subject to a public easement for navigation and its incidents. Thus, the public can walk between the OHWM and OLWM as long as they keep their feet wet.

When the water recedes, exposing the land between the OHWM and OLWM, the riparian has absolute title subject only to the public's right to navigation. The court used the rationale of C. Beck Co. v. Milwaukee,[37] to illustrate the type of public rights in the exposed land. In Beck, a Milwaukee ordinance prevented a Lake Michigan riparian from removing sand and gravel from the beach below the OHWM. The court upheld the ordinance because its purpose was to protect the harbor and consequently, the public's right to navigation. In Doemel, the court did not specifically state that the public has no right to use the exposed land below the OHWM for the incidents of navigation. The court's lack of analysis of whether walking on the shore below the OHWM was an incident of navigation, however, indicates that the public's rights to the incidents of navigation do not extend to the exposed lake bed. Therefore, the public has no right to use the exposed lake bed below the OHWM for bathing, fishing, recreation, or other public purposes.

The court gave two justifications for its rule. First the shore of Lake Winnebago is physically distinguishable from the wet-sand area of the seashore. The wet-sand area of the seashore is covered with water twice daily while the area between the OHWM and OLWM on Lake Winnebago is covered with water seasonally. Therefore, the court did not apply the rule applicable to the wet-sand area in most states--that the public has a right to walk and sunbathe on the wet-sand area of the beach. Second, the riparian rights were fixed rules of property which the court said it could not disturb.

3. Cases After Doemel v. Jantz

No cases after Doemel have addressed whether the public has the right to use the exposed lake bed below the OHWM for the incidents of navigation. However, two landmark cases have expanded public rights under the Public Trust Doctrine.

In Muench v. Public Service Comm.,[38] the court traced the development of public rights under the Public Trust Doctrine. In holding that a member of the public can challenge a PSC decision to dam a stream, the court made two statements illustrating the increasing importance of public rights under the Public Trust Doctrine. First, "The right of citizens to enjoy our navigable streams for recreational purposes, including the enjoyment of scenic beauty, is a legal right that is entitled to all the protection which is given financial rights."[39] Second, the court recognized "the trend to extend and protect the rights of the public to the recreational enjoyment of the navigable waters of the state."[40]

In Just v. Marinette County,[41] the court upheld the county's shoreland zoning ordinance. Under the ordinance, the county fined Just for filling a wetland for development within 1,000 feet of a lake. The court said the state had a duty under the Public Trust Doctrine to preserve navigable waters for fishing, recreation, and scenic beauty. To carry out this duty, the state could regulate the riparian's use of his property; the state could even severely restrict development.

C. Public Trust - Factual Record

The argument that public rights to walk on Great Lakes beaches is good public policy (Introduction above) applies regardless of the legal theory used to establish those rights. The public's position, therefore, would be aided by a record supporting the following statements:

1. Public recreation facility use is increasing;

2. Public use of Great Lakes beaches is increasing;

3. State funds to purchase public recreation facilities and Great Lakes beaches are decreasing;

4. The price of public recreation facilities and Great Lakes beaches is increasing;

5. Public demand for public recreational facilities and Great Lakes beaches will exceed their availability;

6. Tourism is a critical part of the state's economy; and

7. A significant amount of tourism relates to Great Lakes beaches.

The Public Trust Doctrine basis for public rights in beaches is mostly a legal, as opposed to a factual, argument. Two statistics, however, would bolster the argument. First, the public's advocate should be able to show the court the width of the beach between the OHWM and OLWM--both average width and a range of widths from different locations. Second, more importantly, the advocate should determine how often a significant amount of the land between the OHWM and the OLWM is covered with water. Phil Keilor, U.W.-Sea Grant, said the OHWM is created by the seiche, wave run-up, and storm surge. He said that the beach between the OHWM and OLWM is probably covered with water on an average of once or twice a week. He said that Professor Mortimer, U.W.-Milwaukee Center for Great Lakes studies, may have data establishing the frequency and extent of water covering the beach.

D. Public Trust - Constitutionality

Riparians could initiate a court case and make two constitutional arguments if a Wisconsin court established public rights to recreation in Great Lakes beaches. The constitutional framework set out below is identical for all four theories. The framework will not be repeated in section D under each theory, but the applicability of both constitutional arguments to each theory will be analyzed.

1. Procedural Due Process

The Fourteenth Amendment of the United States Constitution states: "No State shall ... deprive any person of ... property without due process of law ..." In Board of Regents v. Roth,[42] the court described the type of property interest protected by the Fourteenth Amendment. The court said procedural due process protects interests created by state law giving a person a legitimate claim of entitlement to the interest. Before a state can deprive a person of a property interest, the person must have notice and a hearing.

If the Wisconsin Supreme Court decided that the Public Trust Doctrine gave the public rights to recreate on all Great Lakes beaches, riparians could argue that the decision deprived them of property without procedural due process. This suit could not be initiated by the riparian parties in the original suit because they had notice and a full hearing. The suit could be initiated by any Great Lake riparian who was not a party in the original suit.

The success of the riparian's procedural due process argument would depend on the width of the beach area included in the decision. If the court limited public rights to the area between the actual water's edge and the OHWM, the riparian's argument would probably fail. The riparian does not have a legitimate claim of entitlement created by state law to exclusive access to Great Lakes beaches between the OHWM and the water's edge.[43] Three factors undercut the riparian's argument: riparians took title to land subject to the public trust below the OHWM; the public often used the beach for recreation; and, no case has previously decided the scope of public and private rights of access to Great Lakes beaches. The riparians, therefore, had no right to notice and hearing.

If the court extends public rights above the OHWM, the riparian's argument may succeed. The riparian has a property right created by state law to exclusive access to his land above the OHWM. The public could argue that they have used the Great Lakes beaches above the OHWM and that under Just v. Marinette County[44] the Public Trust Doctrine extends the state's power to protect public rights in waters above the OHWM. A court could distinguish Just, which allows the state to severely restrict development above the OHWM, as less severe than a state action creating new public rights to use private property. The result of this suit may be to limit the original decision to the area below the OHWM.

2. Substantive Due Process

Any Great Lake riparian, regardless of whether he was a party to the original suit, could bring an action claiming that a decision to give public rights in recreation on all Great Lakes beaches violated substantive due process. The action would be based on Justice Stewart's concurring opinion in Hughes v. Washington.[45] In Hughes, the Washington Supreme Court interpreted the Washington Constitution to give the state title to accretions on oceanfront property. The Washington court's decision reversed its earlier interpretations that the riparian had title to accretions. Although the majority of the United States Supreme Court decided the case on non-constitutional grounds, Justice Stewart decided that the Washington court's decision deprived the riparian of property without due process in violation of the Fourteenth Amendment. Justice Stewart said that the Washington court deprived the riparian of property without compensation because its decision constituted "a sudden change in state law, unpredictable in terms of the relevant precedents ..."[46]

It is difficult to predict whether Justice Stewart's analysis will become that of the Court; however, two federal district courts have applied Stewart's analysis to cases involving public rights in beaches.

In Hay v. Bruno,[47] the riparian challenged the Oregon Supreme Court's decision to adopt the common law doctrine of custom and to find a public easement in the beach fronting his property. The federal court upheld the Oregon court and distinguished Hughes. The federal court held that the Oregon court's decision was not unpredictable because the riparian knew, when he purchased the property, that the public used the beach for recreation. Further, the Oregon decision was supported by court cases in other states preserving beaches for public use.

In Sotomura v. County of Hawaii,[48] the riparian challenged the Hawaii Supreme Court's decision to change the seaward boundary of his land from the seaweed line to the vegetation line. The result of the decision was to change 43 feet of beach from private to public ownership. The Hawaii court adopted and applied the doctrine of custom to justify its decision. The federal court held that the Hawaii decision violated the riparian's due process rights by taking property without compensation. The federal court said the Hawaii decision was an unpredictable change in state law for two reasons. First, consistent common law precedent held that the seaweed line was the boundary between public and private beach. Second, the custom in Hawaii was to exclude the public from the beach above the seaweed line.

If a Wisconsin court decided the Public Trust Doctrine gave the public the right to recreation on Great Lakes beaches, a riparian's suit claiming a substantive due process violation would probably fail. The decision would not be an unpredictable change in state law. The only Wisconsin case addressing public rights to recreation on beaches is Doemel v. Jantz.[49] The Doemel decision is nearly sixty years old and is distinguishable

because it does not involve Great Lakes beaches. The Wisconsin court's statements in Diana Shooting Club, Muench, and Just, emphasize the flexibility of the Public Trust Doctrine and the increasing importance of public rights in waters. Further, the Wisconsin court's decision would be supported by decisions from other states preserving public rights in beaches.[50] Lastly, several modern Wisconsin cases have reversed earlier precedent and significantly changed public and private rights in state waters.[51]

E. Public Trust - Evaluation

A court suit to establish public rights to recreation on Great Lakes beaches based on the Public Trust Doctrine has a good chance of success. The issue of public rights in Great Lakes beaches has never been litigated in Wisconsin. The suit has the best chance of success if the issue is limited to public rights in beach areas traditionally included in the Public Trust Doctrine--the land between the OHWM and the water's edge. By avoiding the issue of the beach area above the OHWM, the public's advocate can rely on well-established Public Trust Doctrine case law and avoid constitutional problems.

The public's strongest arguments are based on the premise that this is a case of first impression. The public's advocate must argue that Doemel v. Jantz is distinguishable because it did not involve Great Lakes beaches. The public's advocate has several strong arguments to convince the court not to apply the Doemel rule to Great Lakes beaches.

First, the physical characteristics of the Great Lakes beaches are different from inland lake beaches. Inland lake beaches are covered with water and exposed seasonally. The Great Lakes beaches are covered with water to the OHWM once or twice weekly. Thus the Great Lakes beaches are more similar to ocean beaches than to inland lake beaches. Seventeen of the twenty-three ocean states recognize public rights to recreation on ocean beaches below the mean high tide line. If Wisconsin adopted the majority rule from the ocean states for its Great Lakes beaches, it would have one rule for inland lakes and another rule for the Great Lakes. The double rule should not unnecessarily concern a court; many ocean states have one rule for ocean beaches and another rule for inland lake beaches.

Second, public policy has changed significantly since Doemel was decided in 1925. As population increased and development increased, the demand for ever more scarce public recreation areas and open space areas increased. The importance of recreation for healthy modern living is documented. Further, since 1925 the importance of Wisconsin's tourism industry has expanded. Court recognition of public rights to recreation on Great Lakes beaches will help insure that public recreational facilities are sufficient in the future.

Third, the modern trend in Wisconsin is to expand public rights under the Public Trust Doctrine. As early as 1914, the Wisconsin court in Dianna Shooting Club v. Hustings[52] recognized the expansive nature of public rights under the Public Trust Doctrine. The court emphasized three aspects of public rights:

1. Public rights included the incidents of navigation--recreation;

2. Riparians took title to lands with notice of the paramount public rights in lake beds; and,

3. Wisconsin courts should broadly interpret the Public Trust Doctrine to protect public rights.

In Muench v. P.S.C.,[53] the court recognized the trend to extend and protect an increasing number of public rights to recreation, including scenic beauty, under the Public Trust Doctrine. The court said public rights deserve the same protection as financial rights.

A suit to establish public rights to recreation on Great Lakes beaches does not require an extension of the court's statements in the cases cited above. Riparians took title to the Great Lakes beaches below the OHWM with notice of paramount public rights. The public's advocate is merely asking the court to recognize the public's rights to the incidents of navigation below the OHWM--a right the public already exercises. The effects of a beach suit on public and riparian rights would be far short of the effects of Just v. Marinette County.[54] In Just, the court severely restricted the riparian's right to develop private land above the OHWM. In a beach suit, the land below the OHWM has always been jointly public and private. The riparian would lose only his exclusive access to the beach, which many Great Lakes riparians do not attempt to enforce. Further, no Wisconsin court has decided that Great Lakes riparians have the right to exclusive access to the beach. In Just, the court held that the Shoreland Zoning Ordinance did not result in a taking of the riparian's land, in part because the ordinance restricted only artificial land uses; the riparian was free to make natural uses of his land. Similarly, if a court recognized public rights to recreation on Great Lakes beaches, the riparian would be able to make natural uses of the beach.

Fourth, the trend in other states is to recognize public rights to recreation on beaches. In State v. Superior Court of Lake County,[55] the California court recognized public rights under the Public Trust Doctrine to the incidents of navigation in land below the OHWM in inland lakes. This decision removed the riparian's rights to reclaim land for development and farming. As noted above, public rights to recreation in Great Lakes beaches has a much smaller effect on riparian rights. Lastly, other states are preserving public rights in beaches through other common law doctrines (see Sections II, III, IV below).

The Public Trust Doctrine has several advantages over theories discussed below to establish public rights in Great Lakes beaches. First, the Public Trust Doctrine was part of Wisconsin law before statehood and it remains the basis for public rights in waters. Second, a court suit based on the Public Trust Doctrine does not require many of the factual bases necessary for the other theories. Third, one suit could establish public rights in all of Wisconsin's Great Lakes beaches. The Public Trust Doctrine has two disadvantages as a theory to establish public rights in beaches. First, the suit may establish public rights only up to the OHWM. An attempt to extend public rights above the OHWM may encounter Public Trust Doctrine and Fourteenth Amendment problems. Second, no Great Lakes state has established public rights in recreation on Great Lakes beaches under the Public Trust Doctrine.

II. CUSTOM

A. Custom - Other States

The first modern case to apply the common law doctrine of custom to establish public rights in beaches was State el rel. Thornton v. Hay.[56] In Hay, the Oregon Attorney General brought an action to force a motel owner to remove a fence which excluded the public from the dry-sand area of a Pacific coast beach. The fence enclosed an area between the mean high tide line and the vegetation line. Under Oregon law, the riparian held title to the beach above the mean high tide line; the state owned the beach below that line. An Oregon statute[57] declared that the public policy of Oregon was to preserve ocean beaches for public use. The statute also stated:

> The Legislative Assembly recognizes that over the years the public has made frequent and uninterrupted use of lands abutting, adjacent and contiguous to the public highways and state recreation areas and recognizes, further, that where such use has been sufficient to create easements in the public through dedication, prescription, grant or otherwise, that it is in the public interest to protect and preserve such public easements as a permanent part of Oregon's recreational resources.[58]

The Attorney General conceded that the statute did not create public rights in the dry-sand area of the beach; the statute merely recognized the right of the public to acquire easements in the beach through sufficient use.

The Attorney General argued that the public had acquired rights in the dry-sand area through long, continuous public use. The Attorney General based his argument on two common law doctrines: implied dedication and prescriptive easement. The court noted that the public's use of the beach satisfied the elements of prescription; however, the court refused to base its decision on prescription because that theory applied only to the specific tract beach at issue in the case. The court feared that prescription cases would fill the courts for years. The court based its decision, that the public had acquired an easement in the dry-sand area of the beach, on the doctrine of custom. The court implied that its decision would apply to all of the dry-sand area on Oregon's Pacific coast.

The court held that the public's recreational use of the dry-sand area of the beach satisfied the seven elements of custom. The court described the elements as follows:

1. Ancient - the public's use was "long and general" extending back to the beginning of land tenure;

2. Without interruption - the public's use need not be continuous but must not have been interrupted by riparians;

3. Peaceable and free from dispute - same as 2.;

4. Reasonableness - the public's use was appropriate for beach property--sunbathing, walking, picnicking;

5. Certainty - the dry-sand area has a visible boundary--the vegetation line;

6. Obligatory - the public's use was not dependent on permission from riparians; and,

7. Consistent - the custom is not inconsistent with any other custom or law.

The only other Oregon case involving the application of custom to beach areas was State Highway Comm. v. Bauman.[59] In Bauman, the Oregon Attorney General attempted to stop a condominium development above the vegetation line on the Pacific coast dunes. The court held that the public had not acquired an easement through custom because the riparian had, for 14 years, posted "No Trespassing" signs, erected fences, and placed chains and logs on roads to exclude the public.

Three states and one federal court have followed Oregon's lead and adopted the custom doctrine. In Moody v. White,[60] a Texas court of appeals upheld an injunction forcing a riparian to remove structures from the dry-sand area of a Gulf coast beach. Although the court based its decision on prescription and dedication, it stated that the public could acquire beach easements through custom.

In City of Daytona Beach v. Tona-Rama, Inc.,[61] the Attorney General attempted to prevent the riparian from erecting a tourist observation tower on the dry-sand area of the beach. The Florida Supreme Court held that the public had acquired an easement in the dry-sand area through custom. The public's recreational use of the area was ancient, reasonable, uninterrupted and free from dispute. The court also held that the riparian could build the tower because it would not conflict with the public's recreational easement.

In United States v. St. Thomas Beach Resorts, Inc.,[62] the riparian erected fences from the vegetation line to the ocean. The riparian argued that the Virgin Islands Open Shoreline Act was an unconstitutional taking of property without compensation in violation of the Fourteenth Amendment. The act stated: "No person ... shall create ... any obstruction ... which would interfere with the right of the public individually and collectively, to use and enjoy any shoreline."[63] The federal district court upheld the statute and ordered the riparian to remove the fence. The court held that the statute was a codification of the public's recreational easement in the beach established through custom.

In State ex rel. Hamen v. Fox,[64] the Idaho Supreme Court applied custom to an inland lake. In Fox, a riparian erected a wall which excluded the public from the beach above the OHWM. The court held that the public could acquire a recreational easement through custom. In this case, however, the public had not satisfied the seven elements. The court said that public's use of the beach from 1912 was not "ancient". Further, the public's use was not uninterrupted because the riparian had removed members of the public from the beach.

B. Custom - Wisconsin

No Wisconsin cases have applied custom to establish public rights in beaches or any other areas.

C. Custom - Factual Record

To establish public rights to recreation on Great Lakes beaches based on custom, the public's advocate must introduce evidence which satisfies the seven elements. Assuming custom is applied to a specific beach tract, as opposed to all of Wisconsin's Great Lakes beaches, the elements could be satisfied as follows:

1. Ancient - This element is unclear. In Oregon, evidence of long and general public use is sufficient.[65] In Idaho, the public use must be longer than public records or memory.[66] It is impossible to predict which test the Wisconsin court would adopt;

2./3. Uninterrupted, Peaceable - Evidence that before the present litigation, the riparian never objected to public use;

4. Reasonable - Evidence of public recreational use of the beach;

5. Certainty - The Great Lakes beaches have a visible boundary--the vegetation line;

6. Obligatory - Evidence that the public did not depend on the riparian's permission. Evidence that the public asked permission probably is not conclusive as long as some members of the public used the beach without permission; and,

7. Consistent - This element is unclear. In Wisconsin, the riparian owns the beach above the OHWM. Technically, any time the public walks on the beach above the OHWM, they are guilty of trespass. This element must not include this type of inconsistency, however, or the public could never establish an easement through custom. The courts which have established public rights in beaches through custom have simply stated, without analysis, that this element is satisfied.

In addition to the evidence to satisfy the elements of custom, the public's advocate should introduce evidence to support his public policy arguments (see Section I.C.).

D. Custom - Constitutionality

(See Section I.D. for constitutional argument framework.)

1. Procedural Due Process

If the court establishes the public's right to recreation based on custom to the specific beach tract at issue in the case, the riparian has no procedural due process argument. The riparian had a full hearing at trial.

If the court establishes the public's right to recreation to all of Wisconsin's Great Lakes beaches, however, riparians not parties in the original suit have a procedural due process argument. Those riparians have arguably lost a property interest, exclusive beach access above the OHWM, without an opportunity for a hearing. The riparians'

procedural due process argument is supported by Sotomura v. County of Hawaii.[67] In Sotomura, the federal district court held that the Hawaii Supreme Court's decision to apply custom and increase public rights in all of Hawaii's beaches violated the riparians' procedural due process rights. Nevertheless, the Great Lakes riparians' argument is questionable. The Oregon court in State ex rel. Thornton v. Hay[68] stated that the public acquired recreational easements to all of Oregon's coastal beaches through custom even though only one beach tract was at issue in the case. Further, in State v. Michels Pipeline Construction, Inc. and Omernick v. State, the Wisconsin Supreme Court significantly limited the private rights in waters of all state landowners even though only one landowner's action was at issue in each case.[69]

2. Substantive Due Process

Riparians' substantive due process arguments would probably fail regardless of whether the court applied custom to the specific tract at issue or to all of Wisconsin's Great Lakes beaches. Court recognition of a public recreational easement in Great Lakes beaches based on custom would not be an unpredictable change in state law for three reasons. First, evidence that establishes the elements of custom would show that Wisconsin's Great Lakes beaches were always treated as public. Second, Wisconsin has consistently expanded public rights in waters (see Section I.B.3.). Third, other states have established public rights in beaches through custom (see Section II.A.).

E. Custom - Evaluation

Custom has three advantages over other theories to establish public rights to recreation on Great Lakes beaches. First, public rights in beaches based on custom, unlike the Public Trust Doctrine, would extend above the OHWM to the vegetation line. Second, the public's advocate need not prove that the public's use was adverse to the riparian's use and under claim of right, difficult elements of implied dedication and prescriptive easement theories. Third, a court could apply custom to the beach at issue in the case or to all of Wisconsin's Great Lakes beaches.

Custom has several drawbacks. No Wisconsin court has applied custom. Wisconsin courts may refuse to adopt custom as a theory to establish public rights. If Wisconsin courts do adopt custom, it is unclear what evidence would be necessary to satisfy the "ancient" and "consistent" elements.

III. IMPLIED DEDICATION

A. Implied Dedication - Other States

Other states apply two variations of the theory of implied dedication. In most states, the owner's intent to dedicate the land must be proven. In California, if the public openly uses the land for five years without asking permission and the owner does not object, then the owner's intent to dedicate need not be proven.

1. California Cases

The California theory of implied dedication is based on Gion v. City of Santa Cruz.[70] In Gion, public officials sued riparians on two ocean beach tracts. The first tract included the beach and overlooking bluff where the public parked cars. The public made general recreational use of the beach for 70 years. The property owner occasionally posted "No Trespassing" signs but they always were quickly torn down. The owner never asked anyone to leave the beach and always granted permission to the few people who asked to use the beach. The City of Santa Cruz facilitated public use of the tract for 60 years. The city oiled the parking lot, built an embankment to prevent cars from driving off the bluff, improved the road, and cleaned the beach. The second tract of land included the beach and the road leading to it. The public made general recreational use of the beach for over 100 years. Until 1960, no property owner objected to public use. After 1960, various owners posted "No Trespassing" signs and placed obstructions over the road. The signs and obstructions always were quickly removed. No governmental agency maintained the road or beach.

The court discussed the two types of implied dedication. If the public's use was for less than five years, the owner's intent to dedicate the land must be proven. If the public's use was for more than five years, the public's intent controls. The court analyzed the case under the second implied dedication theory.

To establish public rights under this theory of implied dedication, the public's use must be for more than five years, with full knowledge of the owner, without asking permission, and without the owner objecting to the use. The public must use the property as if it were a public recreation area; governmental maintenance is an important factor. The public need not prove that its use was adverse to the owner's use or that it claimed a right to use the property. Lastly, the public must show that various groups of people used the property. If the public can prove the elements above, the court presumes the owner intended to dedicate the property for public use.

The property owner can rebut the presumption of intent to dedicate in two ways. First, the owner can show that he granted the public permission to use his property. The owner cannot rely on the common law presumption that public use of wild uninclosed land is presumed to be under permission from the owner. Further, the owner cannot rebut the presumption of intent to dedicate by showing he granted permission to a few of the public users if many other public users did not secure his permission. Second, the owner can rebut the presumption by showing his bona fide attempts to prevent public use.

The court held that the public had acquired the right to recreational use of the beaches and roads in both tracts at issue. The court said that the public's use satisfied the elements of implied dedication and that the owners' attempts to exclude the public were insufficient to rebut the presumption of intent to dedicate. The court stated:

> The present fee owners of the lands in question have of course made it clear that they do not approve of the public use of the property. Previous owners, however, by ignoring the wide-spread public use of the land for more than five years have impliedly dedicated the property to the public. Nothing can be done by the present owners to take back that which was previously given away.[71]

Three cases after Gion clarify the California theory of implied dedication. In Richmond Ramblers Motorcycle Club v. Western Title Guar. Co.,[72] the California Court of Appeals limited the Gion rules of implied dedication to beaches and roads. For other lands, the public must prove their use was adverse, under claim of right, and that the owner intended to dedicate the land. In County of Orange v. Chandler Sherman Corp.,[73] the California Court of Appeals applied the Gion rules and held that the owner did not dedicate his land to the public. The case involved a secluded 2,000 foot long beach. The public used the beach for general recreation in groups rarely exceeding 15 people at a time. The court held that the public's use was not substantial enough to clearly indicate to the owner that his land was in danger of being dedicated. In City of Long Beach v. Daugherty,[74] the California Court of Appeals held that the public acquired a recreational easement through implied dedication to a beach area fronting private homes, even though the public could not have reasonably believed that this beach area was public.

2. Non-California Cases

Texas is the only state other than California that has established public recreational easements in ocean beaches through implied dedication. In Seaway Company v. Attorney General,[75] the Attorney General brought an action to force the riparian to remove fences excluding the public from the dry-sand area of the beach. The action was brought under the Open Beaches Bill[76] which stated Texas's public policy to preserve public beach access if the public acquired an easement by prescription, custom, or dedication.

The court held that the public had acquired a recreational easement in the beach at issue through implied dedication. The court said that implied dedication required that the landowner intend to dedicate the land to public use and that the public accept the dedication. The owner's intent may be shown by his actions. "The act of throwing open property to the public use, without any other formality, is sufficient to establish the fact of dedication to the public ..."[77] Further, the owner's unequivocal acts showing intent to dedicate need not extend for any certain length of time. Once the owner shows his intent and the public, through their actions, accepts the dedication, the owner may not make future use of the land inconsistent with the public's use.

The public made general recreational use of the dry-sand area of the beach at issue for 60 years. No past owner erected fences, posted "No Trespassing" signs, or attempted to exclude the public from the beach. Further, the municipal police patrolled the beach. Therefore, the public acquired a recreational easement over the beach.

The Texas theory of implied dedication differs from the California theory in two respects. First, in California, five years of sufficient public use raises the presumption that the owner intended to dedicate his land; Texas has no time requirement. Second, California requires the owner to make substantial efforts to exclude the public to show his intent not to dedicate. In Texas, however, any owner attempts to exclude the public through obstructions or signs may be sufficient to show his intent not to dedicate. Texas requires that the owner's actions show an unequivocal intent to dedicate while California presumes intent to dedicate based on public use.

Idaho applied a theory of implied dedication identical to the Texas theory in State ex rel. Hamen v. Fox.[78] The Idaho court held that the public did not acquire a recreational easement through implied dedication over an inland lake beach above the OHWM. The court specifically rejected the California theory. It said the owner's attempts to exclude the public from the beach showed he did not unequivocally intend to dedicate the beach.

Maryland rejected any theory of implied dedication in Department of Nat. Res. v. Mayor and Council of Ocean City.[79] The Maryland Court of Appeals held that the public had no rights in the dry-sand area of the ocean beach. The court said that the owner's intent to dedicate could not be implied from public use of his property. Further, dedication was merely a form of prescription so all of the elements of prescription must be satisfied (see Section IV.A.).

B. Implied Dedication - Wisconsin

Wisconsin's approach to dedication is similar to that of Maryland. The essential elements of dedication are the owner's intent to dedicate his property for public use and the public's acceptance of the dedication.[80] The owner's intent can be proven in two ways. First, the owner may express his intent to dedicate. It is unlikely that Great Lakes riparians have expressed an intent to dedicate the beach for public use. Second, the owner's intent can be implied from his unequivocal conduct. If the owner knows of the public's adverse use of his property for more than 20 years, intent to dedicate is implied.[81] In State v. Town Board,[82] the Wisconsin Supreme Court overturned prior cases which held that mere public use of land for 20 years, under circumstances which do not show adverse use, created a presumption that the owner intended to dedicate the land. In essence, implied dedication in Wisconsin is identical to prescription (see Section IV.B.). Wisconsin, therefore, does not recognize the Texas or California theories of implied dedication.

C. Implied Dedication - Factual Record

The evidence necessary to establish public rights in Great Lakes beaches through implied dedication depends on the theory of implied dedication adopted by the court. If the court applies its analysis from State v. Town Board, the evidence must satisfy the elements of prescription (see Section IV.C.). If the court adopts the Texas theory, evidence that the public made general recreational use of the beach, with full knowledge of that use by the owner, and that the owner did not attempt to exclude the public is sufficient. The evidence can apply to any time period, even before the present owner acquired the land. If the court adopts the California approach, the public's advocate must introduce evidence of the public's general recreational use of the beach for the prescriptive time period (5 years in California but possibly 20 years in Wisconsin), of the owner's full knowledge of the public's use, and of the owner's lack of or insufficient attempts to exclude the public.

D. Implied Dedication - Constitutionality

(See Section I.D. for constitutional arguments framework.)

1. Procedural Due Process

Great Lakes riparians have no procedural due process challenge to a court's decision to establish public rights in beaches through implied dedication. Implied dedication applies only to the beach tract at issue in the case; thus, the riparian had a full hearing.

2. Substantive Due Process

If a court established public rights in Great Lakes beaches based on its implied dedication theory in State v. Town Board, riparians could not reasonably argue that the decision was an unpredictable change in state law. The court applied the implied dedication theory to a lake beach in Hunt v. Oakwood Hills Civic Asso.[83] Thus, the court would not change state law by following its analysis from past cases.

Even if a court established public rights by adopting the Texas or California theory of implied dedication, the riparian's argument may fail. One major difference between the Texas/California theories and the Wisconsin theory from State v. Town Board is the requisite time period of public use. If a court adopted a period shorter than 20 years, the riparian could argue that the shorter time period is an unpredictable change in state law which results in a taking of property without compensation. Assuming a court would retain Wisconsin's 20-year requirement, the other apparent difference in the theories is that Wisconsin requires that the public's use be "adverse" to the owner and under claim of public right, while the Texas/California theories do not. This difference, however, is illusory. Wisconsin courts presume the public's use of most lands, other than woodlands, is adverse if the use is peaceable and uninterrupted for 20 years (see Section IV.B.). Therefore, a court's adoption of the Texas or California theory would not constitute an unpredictable change in state law.

E. Implied Dedication - Evaluation

A Wisconsin court has no reason to adopt the California or Texas theory of implied dedication. Public rights in Great Lakes beaches can be based on Wisconsin's theory of implied dedication/prescription. By manipulating the "adverse" presumptions, Wisconsin's implied dedication/prescription theory becomes similar to the California and Texas theories. The "adverse" presumptions are fully discussed in Section IV.B.2. below.

IV. PRESCRIPTIVE EASEMENT

A. Prescriptive Easement - Other States

The first modern case to establish public rights in beaches based on prescription was Seaway Company v. Attorney General.[84] In Seaway, the Texas Attorney General brought an action to force an ocean riparian to

remove fences excluding the public from the dry-sand area of the beach. The action was brought under the Open Beaches Bill[85] which recognized the public's rights to acquire easements through prescription.

The court identified three elements of prescription: the public's use must be (1) adverse to the owner and not permissive under the owner, (2) continuous for the prescriptive period (10 years in Texas), and (3) under claim of right in the public. The riparian argued that the public's recreational use of the beach was identical to his use; therefore, the public's use was not adverse. The court held, however, that the following facts satisfied both the "adverse" and "under claim of right" elements. The public did not ask permission to use the beach and the owner did not object. Municipal officials advertised the beach as public and maintained the beach. The riparian also argued that the location of the public easement was too uncertain to give him notice of the public's easement. The court held that the vegetation line, a visible physical boundary, clearly marked the landward boundary of the public's easement.

The strength of Texas's commitment to public rights in beaches is illustrated by the Texas Court of Appeals opinion in Moody v. White.[86] In Moody, the Attorney General brought an action under the Open Beaches Bill to force an ocean riparian to remove his motel from the dry-sand area of the beach. The court held that the riparian must remove his motel because the public had acquired a prescriptive easement. For many years, the public used the beach for general recreation and established public roadways on the beach to control the flow of people. The court's only analysis of the prescriptive easement elements was the following sentence: "The public's use of the beach for many years was so open, visible, and notorious that the appellants must have recognized the people's right to the beach."[87] The court apparently presumes that long, open, intensive public use satisfies the "adverse" and "under claim of right" elements.

Two other states recognize the public's right to acquire prescriptive easements over beaches. In City of Daytona Beach v. Tona-Rama Inc.,[88] the Florida Attorney General brought an action to stop an ocean riparian from erecting an observation tower on the dry-sand area of the beach. The court applied the same elements of prescription as the Texas courts. The Florida court, however, applied the following presumption: "[T]he use or possession is presumed to be in subordination to the title of the true owner, and with his permission and the burden is on the claimant to prove that the use or possession is adverse."[89] The court held that the public did not satisfy the elements of prescription. The court said the public had made extensive recreational use of the beach for many years. The public's use, however, did not injure the owner or invade his property rights; thus, the public's use was not "adverse". The Maryland Court of Appeals applied a similar analysis in Department of Natural Resources v. Mayor and Council of Ocean City.[90]

The Texas, Florida, and Maryland cases each recognize the public's right to acquire prescriptive easements over beaches. In State ex rel. Hamen v. Fox,[91] the Idaho Supreme Court held that the public cannot acquire prescriptive rights in property absent specific statutory authority. The Idaho legislature had recognized the public's right to prescription only in highways. Therefore, the court held the public could not acquire a prescriptive easement over an inland lake beach.

B. Prescriptive Easement - Wisconsin

1. Elements

In Wisconsin, one can acquire an easement over another's property through prescription or dedication. The elements of the two theories are similar. Prescription has four elements. The party attempting to establish a prescriptive easement must show that his use was (1) adverse to the owner and not permissive, (2) open, (3) under claim of right, and (4) continuous and uninterrupted for 20 years.[92] Dedication has two elements: owner's intent to dedicate and acceptance by the public. Under Wisconsin's theory of implied dedication, the owner's intent will be presumed if the public's use was adverse to the owner and not permissive, sufficiently open to give the owner notice of the public's use and claim of right, and continuous for 20 years.[93]

2. Presumptions

In prescriptive easement and implied dedication cases, Wisconsin courts usually apply either the "unexplained use" or the "undeveloped land" presumption. The usefulness of the prescriptive easement/implied dedication theory to establish public rights in Great Lakes beaches depends on which of the two presumptions a court applies.

In Shellow v. Hagen,[94] the court described the "unexplained use" presumption as follows:

> When it is shown that there has been the use of an easement for twenty years, unexplained, it will be presumed to have been under a claim of right and adverse, and will be sufficient to establish a right by prescription, and to authorize the presumption of a grant, unless contradicted or explained. In such a case the owner of the land has the burden of proving that the use of the easement was under some license, indulgence, or special contract inconsistent with the claim of right by the other party. (citations omitted)

In Shellow, plaintiffs owned an island in front of defendant's lakeshore property. The island was accessible only by water. The plaintiffs regularly parked their cars and boats on a part of defendant's land for 26 years. The defendant riparian used the same land to dock his boats and to gain access to his pier for swimming and fishing. The court applied the "unexplained use" presumption and held that the plaintiff acquired a prescriptive easement over the lakeshore portion of the defendant's property.

The court rejected the riparian's attempts to rebut the presumption. The riparian argued that the plaintiff's use was not adverse because it did not interfere with the riparian's use. The court said adverse use is use which is open, nonpermissive, and wrongful or maybe made

wrongful by the owner. Adverse use need not be exclusive or inconsistent with the rights of the owner if the use is in disregard of true ownership. The riparian also argued that the plaintiff's use was not continuous and uninterrupted. The court defined the term "continuous and uninterrupted" as follows: "Continuity depends on the nature and character of the rights claimed. Such acts need not be constant, daily, or weekly."[95] The court said the use of property when not needed does not disprove the use when needed. The court held that plaintiff's use, parking cars and boats when necessary, was continuous and uninterrupted.

The "unexplained use" presumption probably applies to the public's use of Great Lakes beaches. The public has used most of the Great Lakes beaches for more than 20 years. The public's use is sufficiently "continuous and uninterrupted" under Shellow because the public used the beach when "necessary"--when the public desired to do so. The fact that the public may not have used the beach every day or week is irrelevant.

A riparian can rebut the presumption and destroy the public's claim of a prescriptive easement/implied dedication by showing that he permitted the public's use--that the use was not "adverse". The riparian will probably need to prove that he actually gave the public permission to use his beach. The riparian's inaction is insufficient to show permission because the public's use was illegal. Under Doemel v. Jantz, the riparian could have had the public arrested for trespass; therefore, the public's use was adverse.

The "undeveloped land" presumption is an exception to the "unexplained use" presumption. The "undeveloped land" presumption is defined as follows: "There is a presumption that the use of uninclosed, unimproved, and unoccupied land is permissive and not adverse."[96] The effect of this presumption is that the person claiming an easement through prescription or dedication must prove his use was adverse and under an open claim of right. Proof that the owner did not object is insufficient.[97] If the "undeveloped land" presumption applies, to establish a prescriptive easement in Great Lakes beaches, the public's advocate must show the riparian knew or should have known that the public claimed the right to use the beach in violation of the riparian's rights.

Six Wisconsin cases addressed whether the "undeveloped land" presumption applied to particular land parcels. In Bassett v. Soelle,[98] the court adopted the "undeveloped land" presumption. In Bassett, the defendant claimed a prescriptive easement in a path over plaintiff's unfenced, undeveloped woods. The court held that the defendant did not establish a prescriptive easement because a way over uninclosed woodlands is presumed to be permissive. The court adopted the presumption because it was customary for the public to pass through uninclosed woodlands without express permission; therefore, the owner would not have adequate notice that the public's use of a path was under a claim of right.

In Shepard v. Gilbert,[99] the court more clearly defined the type of land to which the "undeveloped land" presumption applies. In Shepard, the court held that the plaintiff established a prescriptive easement in a path over an open lot in a partially developed subdivision. The court held that the "undeveloped land" presumption did not apply. The court said that the Bassett court's distinction between inclosed and uninclosed land was not determinative. Rather, the presumption applies to unimproved land largely in the state of nature, not to land which is improved or in the process of being improved for urban or agricultural use.

In Carlson v. Craig,[100] the court held that plaintiff had established a prescriptive easement in an old tote road over defendant's eleven-acre tract. The court held that the "undeveloped land" presumption did not apply because a small portion of the tract had been cleared for an orchard 35 years before. The court distinguished Bassett because in that case the entire woodland tract was undeveloped.

In Shellow v. Gilbert,[101] the court held that the plaintiff established a prescriptive easement in a one-acre portion of defendant's lakeshore property. Defendant's six-acre tract was divided by a public road. The plaintiff parked cars and boats on a one-acre portion which was weedy and undeveloped. The defendant resided on the five-acre portion across the road. The court held that the "undeveloped land" presumption did not apply to the one-acre tract because the defendant had continuously occupied the five-acre tract; therefore, defendant's land was not "wild and unimproved in a wild and unimproved region".[102]

In Bino v. Hurley,[103] the court held that the public did not acquire rights in a road to a lake through implied dedication. The court held that the "undeveloped land" presumption did apply. The road traversed an eighty-acre tract of second-growth forest. The only buildings on the tract were an ice house and several warming shacks for skiing. The court said the presumption should apply to woodlands near lakes because the public customarily used tote roads leading to lakes without permission.

In the five cases above, the court's decisions of whether to apply the "undeveloped land" presumption turns on two factors: the nature of the land and the public custom. The cases in which the court applied the presumption and found no public easement, Bino and Bassett, involved large tracts of virtually undeveloped woodland over which the public customarily passed without permission. The cases in which the court held the presumption did not apply and found a prescriptive easement, Shepard, Carlson, and Shellow, involved land tracts which were partially developed or undeveloped tracts in a partially developed region. In these cases, whether the public customarily traversed these types of land without permission was not a major factor in the court's decisions.

In the most recent case in this line New v. Stock,[104] the court deviated from its precedents. In New, the court held that plaintiffs did not establish a prescriptive easement in a 15-foot-wide strip of

land between two houses in a partially-developed subdivision. The court held that the strip was uninclosed, unimproved land until the strip's weeds were cleared. The court emphasized that before the strip was cleared, it was nearly inaccessible. Although the court said it was following its decisions in Bassett and Bino, it clearly ignored its analysis from those cases. The strip was not a large tract of land, not a woods, and not in an undeveloped area. Although the land in New was similar to the land in Shepard and Shellow, the court ignored those cases. It is difficult to tell whether New represents a shift in the court's analysis of the "undeveloped land" presumption or whether New is an aberration which will not be followed. Nevertheless, New is distinguishable from a beach suit because the Great Lakes beaches are usually easily accessible.

Whether a Wisconsin court would apply the "undeveloped land" presumption to Great Lakes beaches is a close issue. Although most Great Lakes beaches are unimproved, they are part of riparian land tracts improved for either agricultural or residential use. On the other hand, the public customarily uses the beaches without permission. If a court was convinced that public access to beaches was good public policy, it could hold that the presumption did not apply and establish a prescriptive easement by applying the analysis from Shepard, Carlson and Shellow. The court could reach the opposite result, however, by applying the analysis from New.

3. Public or Private Easements

The discussion above assumed the public has the capacity to acquire easements in Great Lakes beaches through implied dedication and prescription. The public clearly can acquire easements through dedication. In Bino the issue was whether the public had acquired an easement in a road leading to a lake through implied dedication. Public easements through dedication are not limited to roads. In Hunt v. Oakwood Hills Civic Asso.[105] the issue was whether the public had acquired the right to use a beach through dedication.

The Wisconsin Supreme Court has never decided whether the public can acquire prescriptive easements. The court has, however, made statements about this issue. In New v. Stock,[106] the court said, "so is generally held that the public cannot acquire rights by prescription ..."[107] The court cited no cases to support this statement. The court then stated, "An exception, however, is made in the case of a public highway ..."[108] In Doemel v. Jantz[109] and Lundberg v. Notre Dame,[110] the court indicated the public can acquire prescriptive rights. In Doemel, the court stated the public can acquire riparian rights by prescription. In Lundberg, one issue in the case was whether the public had acquired a prescriptive right to use a path between two lakes.

Four arguments can be made to support the public's right to acquire easements in Great Lakes beaches through prescription. First, Doemel and Lundberg imply that the public can acquire prescriptive rights. Second, the beach could be considered a public highway, an exception to the rule in New. Third, because the elements of implied dedication

and prescription are nearly identical, a court should adopt the same rule for both: the public should have the capacity to establish public easements through implied dedication and prescription. Fourth, other states have held that the public has the capacity to acquire beach easements through prescription (see Section IV.A.).

C. Prescriptive Easement - Factual Record

A public easement in Great Lakes beaches acquired through prescription or implied dedication would apply only to the beach tract at issue in the case. The public's advocate must prove that the public made general recreational use of the tract for more than 20 years. If the court applies the "unexplained use" presumption, this proof would be sufficient to establish the easement. If the court applies the "undeveloped land" presumption, the public's advocate must prove that the riparian did not give permission for the public's use and that the riparian knew the public claimed the right to use the beach. The court is less likely to apply the "undeveloped land" presumption if the land adjacent to the beach is fully developed and if the public's advocate convinces the court that a public easement is good public policy (see Section I.C.).

D. Prescriptive Easement - Constitutionality

(See Section I.D. for constitutional arguments framework.)

Riparians have no valid constitutional arguments to a court's decision establishing a public easement in a Great Lakes beach through prescription or implied dedication. Riparians have no procedural due process argument because the decision would apply to only the tract at issue in the case; thus, the riparians had a full hearing. The riparians have no substantive due process argument because prescription and dedication are well-established theories in Wisconsin which courts have previously applied to beach tracts.

E. Prescriptive Easement - Evaluation

Prescriptive easement/implied dedication theory has several advantages over other theories to establish public rights to recreation on Great Lakes beaches. First, Wisconsin courts are familiar with prescription/dedication. The theory is well established in Wisconsin and has been applied to beaches. Second, the prescription/dedication theory is not vulnerable to constitutional attack. Third, prescription/dedication

has fewer elements than custom. Fourth, unlike the Public Trust Doctrine, prescription/dedication applies to the entire beach used by the public and is not limited to the beach below the OHWM.

The fact that prescription/dedication applies to only the tract at issue in the case has both positive and negative effects. On the positive side, a court may be more willing to establish public rights in one beach rather than all of the Great Lakes beaches. By limiting its decision to one beach, the court avoids an extensive change in Wisconsin property law, avoids angering many riparians, yet establishes a precedent for public rights in Wisconsin's Great Lakes beaches. These considerations are especially important to the trial judge who generally will follow established case law but is reluctant to create new law. Further, the party that wins at trial enjoys the presumption on appeal that the trial court's application of the facts to the law was correct. On the negative side, to establish public rights in all Great Lakes beaches through prescription/dedication, the public must win many court suits. The expense and time required to win these suits would be enormous. Further, a court may fear that these suits would fill the courts for years.

Prescription/dedication has two other problems as a theory to establish public rights in Great Lakes beaches. First, it is unclear whether the court will apply the "undeveloped land" presumption to Great Lakes beaches. If it did apply this presumption, the proof required to rebut the presumption and establish a public easement is very difficult. Second, it is unclear whether the public has the capacity to acquire prescriptive easements. The public's advocate can probably avoid this problem by basing the suit on prescription and dedication.

CONCLUSION

A court suit to establish public rights to recreation on Great Lakes beaches could be based on the Public Trust Doctrine, custom, prescription, or implied dedication. The public advocate's choice of theories to employ depends on his objectives for the suit. If the primary objective is to establish public rights in the specific beach tract at issue, and the secondary objective is to establish public rights in all Great Lakes beaches, the public's advocate should argue all four theories. If the advocate introduces facts to satisfy the elements of the theories, there is a good chance a court will recognize public rights in the beach tract at issue under implied dedication, prescription, or the Public Trust Doctrine. The court may also accept the advocate's argument that the public has recreational rights in all Great Lakes beaches under the Public Trust Doctrine or custom.

If the main objective of the suit is to establish public rights in all of Wisconsin's Great Lakes beaches, the advocate may want to limit his arguments to the Public Trust Doctrine and custom. Under those two theories, a court could establish public rights to beaches not at issue in the suit. If the

implied dedication and prescription theories are eliminated from the suit, the issue of public rights in all Great Lakes beaches is more squarely presented; thus, a court would be less likely to limit its decision to the specific tract at issue. The advantage of a suit based on custom and the Public Trust Doctrine is that it urges the court to establish public rights in all Great Lakes beaches in one suit. The disadvantage is that it makes it easier for a court to refuse to establish any public rights, even in the beach tract at issue.

If a court decides the public has rights to recreation on all Wisconsin's Great Lakes beaches, individual riparians could establish their exclusive rights to the beach through adverse possession. The riparians would have to initiate a court suit and prove their possession of the beach was open, notorious, exclusive, and hostile to the public's use[111] for twenty years.[112] Industrial development on Great Lakes shores, therefore, would remain private.

Regardless of the public advocate's legal theory to establish public rights in beaches, the ideal beach tract for the suit has several characteristics. The public should have used the beach for many years for general recreation. Substantial public recreational use by various groups is essential. The public's use should have been obvious to the riparians. Recent riparian attempts to exclude the public from the beach by illegal or obnoxious means would be helpful. Lastly, the beach should be flat enough to allow a significant portion to be covered by water during storm surge, wave run-up, and seiche.

A complete factual record is essential. The public advocate must introduce evidence to establish the factual bases for the elements of the legal theory and to convince the court that public recreation in Great Lakes beaches is necessary for public welfare.

BA:ry/3979W

FOOTNOTES

1. Access to the Nation's Beaches: Legal and Planning Perspectives, D. Brower et.al., UNC Sea Grant, 1978, p. 21.

2. Shoreline for the Public, D. Ducsik, MIT Sea Grant, 1972, p. 90.

3. Illinois Central Railroad v. Illinois, 146 U.S. 387 (1892).

4. Shively v. Bowlby, 152 U.S. 1 (1893).

5. Access to Our Nation's Beaches, p. 21.

6. E.g.: Marks v. Whitney, 98 Cal. Rept. 790, 491 P. 2d 374 (1971); Jackovony v. Powel, 21 A. 2d 554 (R.I. 1941); Tucci v. Salzhauer, 336 N.Y.S. 2d 721, 40 A.D. 2d 712 (1972).

7. 98 Cal. Rept. 790, 491 P. 2d 374 (1971).

8. 471 P. 2d at 380.

9. Access to Our Nation's Beaches, p. 21.

10. See E.g.: In Re Opinion of the Justices, 313 N.E. 2d 561 (Mass. 1974).

11. Id.

12. See E.g.: Department of Natural Resources v. Ocean City, 274 Md. 1, 332 A. 2d 630 (1975).

13. 61 N.J. 296, 294 A. 2d 47 (1972).

14. 294 A. 2d at 53.

15. Id., at 54.

16. State ex. rel. Buckson v. Pennsylvania R.R. Co., 267 A. 2d 455 (Del. 1969); Brundage v. Knox, 279 Ill. 450, 117 N.E. 123 (1917); Hilt v. Weber, 252 Mich. 198, 233 N.W. 159 (1929); State v. Slotness, 185 N.W. 2d 530 (Minn. 1971); United States v. Eldridge, 33 F. Supp. 337 (D. Mont. 1940); Stewart v. Turney, 237 N.Y. 117, 142 N.E. 437 (1923); State v. Loy, 20 N.W. 2d 668 (N.D. 1945); State v. City of Cleveland, 150 Ohio 303, 82 N.E. 2d 709 (1948); Freeland v. Pennsylvania R.R. Co., 197 Pa. 529, 47 A. 745 (1901); State v. Deisch, 38 S.D. 560, 162 N.W. 365 (1917); Wilbour v. Gallagher, 462 P. 2d 232 (Wash. 1969).

17. See E.g. Wilbour v. Gallagher, 462 P. 2d 232 (Wash. 1969).

18. See the cases cited in Fn. 17 involving Great Lakes states.

19. The state agencies with jurisdiction over the Great Lakes beaches for each Great Lake state told me the public has no right to walk on the beaches fronting private land. None of the state agencies, however, could cite any statute or court case directly supporting their opinions.

20. Anderson v. Reames, 161 S.W. 2d 957 (Ark. 1942); State v. Florida National Properties Inc., 338 So. 2d 13 (Fla. 1976); West v. Smith, 95 Idaho 550, 511 P. 2d 1326 (1973); Mather v. State, 200 N.W. 2d 498 (Iowa 1972); Evans v. Dugan, 205 La. 216, 161 S.W. 2d 957 (1944).

21. See E.g. Anderson v. Reames, 161 S.W. 2d 957 (Ark. 1942).

22. 100 Idaho 140, 594 P. 2d 1093 (1979).

23. 172 Cal. Rept. 696, 625 P. 2d 239 (1981).

24. Menzer v. Village of Elkhart Lake, 51 Wis. 2d 70, 186. N.W. 2d 290 (1971); Branch v. Oconto County, 13 Wis. 2d 595, 109 N.W. 2d 105 (1961); McLennan v. Prentice, 85 Wis. 427, 55 N.W. 764 (1893).

25. 42 Wis. 248 (1877).

26. 42 Wis. 214 (1877).

27. 85 Wis. 427, 55 N.W. 764 (1893).

28. 109 Wis. 418, 84 N.W. 855 (1901).

29. 139 Wis. 340, 120 N.W. 293 (1909).

30. Delaplaine v. C. & N.W. Ry. Co., 42 Wis. 214 (1877); McLennan v. Prentice, 85 Wis. 427, 55 N.W. 764 (1893).

31. Delaplaine v. C. & N.W. Ry. Co., 42 Wis. 214 (1877).

32. Id.; Boorman v. Sunnucks, 42 Wis. 233 (1877).

33. Boorman v. Sunnucks, 42 Wis. 233 (1877).

34. Dianna Shooting Club v. Husting, 156 Wis. 261, 145 N.W. 816 (1914).

35. Id., at 271-72.

36. 180 Wis. 225, 193 N.W. 393 (1925).

37. 139 Wis. 340, 120 N.W. 293 (1909).

38. 261 Wis. 492, 53 N.W. 2d 514 (1951).

39. Id., at 511-12.

40. Id., at 508.

41. 56 Wis. 2d 7, 201 N.W. 2d 761 (1972).

42. 408 U.S. 564 (1972).

43. The riparians would argue that Doemel v. Jantz gives them a legitimate claim under state law to exclusive beach access. The public advocate would argue, however, that Doemel does not apply to Great Lakes beaches; therefore, the riparian has no legitimate claim of entitlement to exclusive access to Great Lakes beaches below the OHWM.

44. 56 Wis. 2d 7, 201 N.W. 2d 761 (1972).

45. 389 U.S. 290 (1967).

46. Id., at 296.

47. 344 F. Supp. 286 (D. Ore. 1972).

48. 460 F. Supp. 473 (D. Ha. 1978).

49. 180 Wis. 225, 193 N.W. 393 (1925).

50. See cases cited in Fns. 20, 23.

51. E.g.: State v. Michels Pipeline Construction, Inc., 63 Wis. 2d 278, 217 N.W. 2d 339 (1974) (recognizing public nuisance action for interference with groundwater); Just v. Marinette County, 56 Wis. 2d 7, 201 N.W. 2d 761 (1972) (severely restricting riparian's artificial use of wetlands); State v. Dietz, 66 Wis. 2d 1, 224 N.W. 2d 407 (1974) (recognizing cause of action for person damaged by another's diversion of surface water); Omernick v. State, 64 Wis. 2d 6, 218 N.W. 2d 734 (1974) (holding that riparians must get sec. 30.18 Stats. permit to divert water from non-navigable streams).

52. 156 Wis. 261, 145 N.W. 816 (1914).

53. 261 Wis. 492, 53 N.W. 2d 514 (1951).

54. 56 Wis. 2d 7, 201 N.W. 2d 761 (1972).

55. 172 Cal. Rept. 696, 625 P. 2d 239 (1981).

56. 254 Ore. 584, 462 P. 2d 671 (1969).

57. Ore. Rev. Stats. § 390-610 (1967).

58. Id.

59. 16 Ore. A. 275, 517 P. 2d 1202 (1974).

60. 593 S.W. 2d 372 (Tex. Ct. App. 1979).

61. 294 So. 2d 73 (Fla. 1974).

62. 386 F. Supp. 769 (D. V.I. 1974).

63. Revised Organic Act of the Virgin Islands § 3 (1954).

64. 100 Idaho 140, 594 P. 2d 1093 (1979).

65. State ex rel. Thornton v. Hay, 254 Ore. 584, 462 P. 2d 671 (1969).

66. State ex rel. Hamen v. Fox, 100 Idaho 140, 594 P. 2d 1093 (1979).

67. 460 F. Supp. 473 (D. Ha. 1978).

68. 254 Ore. 584, 462 P. 2d 671 (1969).

69. See Fn. 51.

70. 84 Cal. Rptr. 162, 465 P. 2d 50 (1970).

71. 465 P. 2d at 60.

72. 47 Cal. App. 3d 747, 121 Cal. Rptr. 308 (1975).

73. 54 Cal. App. 3d 561, 126 Cal. Rptr. 765 (1976).

74. 75 Cal. App. 3d 972, 142 Cal. Rptr. 593 (1977).

75. 375 S.W. 2d 923 (Tex. 1964).

76. Vernon's Ann. Civ. St. Art. 5415d § 1 et. seq.

77. Seaway Co. v. Attorney General, 375 S.W. 2d at 936 (Tex. 1964).

78. 100 Idaho 140, 594 P. 2d 1093 (1979).

79. 274 Md 1, 332 A. 2d 630 (Ct. App. 1975).

80. Galewski v. Noe, 266 Wis. 7, 62 N.W. 2d 703 (1954).

81. State v. Town Board, 192 Wis. 186, 212 N.W. 249 (1927).

82. Id.

83. 19 Wis. 2d 113, 119 N.W. 2d 466 (1962). The court held that the owner did not intend to dedicate the beach under the facts of the case.

84. 375 S.W. 2d 923 (Tex. 1964).

85. Vernon's Ann. Civ. St. Art. 5415d § 1 et. seq.

86. 593 S.W. 2d 372 (Tex. Ct. App. 1979).

87. Id., at 378.

88. 294 So. 2d 73 (Fla. 1974).

89. Id., at 76.

90. 274 Md. 1, 332 A. 2d 630 (Ct. App. 1975).

91. 100 Idaho 140, 594 P. 2d 1093 (1979).

92. Ludke v. Egan, 87 Wis. 2d 221, 274 N.W. 2d 641 (1978).

93. State v. Town Board, 192 Wis. 186, 212 N.W. 249 (1927).

94. 9 Wis. 2d 506, 510, 101 N.W. 2d 694 (1959).

95. Id., at 512.

96. Bino v. Hurley, 14 Wis. 2d 101, 109 N.W. 2d 544 (1960).

97. Bassett v. Soelle, 186 Wis. 53, 202 N.W. 164 (1925).

98. Id.

99. 212 Wis. 1, 249 N.W. 54 (1933).

100. 264 Wis. 632, 60 N.W. 2d 395 (1953).

101. 9 Wis. 2d 506, 101 N.W. 2d 694 (1960).

102. Id.

103. 14 Wis. 2d 101, 109 N.W. 2d 544 (1961).

104. 49 Wis. 2d 469, 182 N.W. 2d 276 (1971).

105. 19 Wis. 2d 113, 119 N.W. 2d 466 (1962).

106. 49 Wis. 2d 469, 182 N.W. 2d 276 (1971).

107. Id., at 474.

108. Id.

109. 180 Wis. 225, 193 N.W. 393 (1925).

110. 231 Wis. 187, 282 N.W. 184 (1939).

111. Allie v. Russo, 88 Wis. 2d 334, 276 N.W. 2d 740 (1979).

112. Wis. Stats. § 893.29 (1979-1980).